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IN THE

Supreme Court of the United States

October Term, 1937.

No. 864

LOWE BROTHERS COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE PETITIONER.

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BRIEF OF THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 30 to 34) is published in *8 F. Supp. 1016*. The opinion of the Circuit Court of Appeals (R. 48) is published in *92 F. (2d) 905*.

JURISDICTION.

The judgment of the Circuit Court of Appeals was rendered November 11, 1937 (R. 47), and a petition for rehearing was denied December 17, 1937 (R. 55).

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925. *Certiorari* was granted April 25, 1938.

QUESTION PRESENTED.

Where an income tax exceeding $10,000 is collected by credit does the District Court of the United States have jurisdiction of a suit against the United States for its recovery if both the Collector in office when the credit collection was made and the Collector to whom the overpayment credited was paid in cash are out of office at the time the suit is begun.

STATUTES INVOLVED.

Judicial Code as amended:

> *Sec. 24.* The District Courts shall have original jurisdiction as follows:
>
> * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. *(U. S. C., Title 28, Sec. 41.)*

Section 24 of the Judicial Code (paragraph 5) reads:

"*Sec. 24.* The District Courts shall have original jurisdiction as follows:

* * *

(5) Cases under internal revenue, customs, and tonnage laws. Fifth. Of all cases arising under any law providing for internal revenue, or ~~from~~ revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. *(R. S., Sec. 563, par. 5, Sec. 629, par. 4; Mar. 3, 1911, c. 231, Sec. 24, par. 5, 36 Stat. 1092.)*"

"Revised Statutes:

"*Sec. 989.* When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer or that he acted under the direction of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

"*(U. S. C., Title 28, Sec. 842.)*"

"*Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875:*

"*Sec. 607.* Effect of Expiration of Period of Limitation Against United States.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-

payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of Limitation for filing such claim.

"(U. S. C. Sup., Title 26, Sec. 2607.)

"Sec. 609. Erroneous Credits.

"(a) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under *section 607.*

"(c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

"(U. S. C. Sup., Title 26, Sec. 2609.)[1]

"The Commissioner is authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title where such taxes have not been duly paid by stamp at the time and in the manner provided by law.

"(U. S. C. A., Title 26, Sec. 1530; R. S. 3182.)

"The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified.

"(U. S. C. A., Title 26, Sec. 1531; R. S. 3182.)"

"It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.

"(U. S. C., Title 26, Sec. 1541 (a); R. S. 3183.)

"Every collector within his collection district shall see that all laws and regulations relating to the col-

1. Sections 607 and 609 were construed by this Court in **Stearns Co. v. United States, 291 U. S. 54,** at p. **60;** "to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval or with approval falling short of inducement or request". Such was the credit in the case at bar. It was illegal because made after the right to make it was barred and it was invalid under the quotation from the opinion of this Court.

lection of internal-revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto.

"(U. S. C., Title 26, Sec. 1544.)

"Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(U. S. C., Title 26, Sec. 322 (a).)"

SPECIFICATION OF ERROR TO BE URGED.

The Circuit Court of Appeals erred in holding the District Court had no jurisdiction of this suit.

STATEMENT OF THE CASE.

As stated by the respondent in its memorandum in response to the petition for the writ

"the case involves crediting of an overpayment of taxes for the year 1918 against a deficiency in taxes for the year 1917 in the amount of $11,230.14, at a time when the collection of the deficiency was barred by statute".

The facts in the case are contained in the allegations of the petition (R. 17-28), and special findings of fact by the Court at the request of the parties as set forth in the entry filed October 22, 1934 (R. 38).

The facts material to the decision of the questions presented in this case are as follows:

The petitioner is a corporation existing under the laws of Ohio, with its principal place of business in the City of Dayton, Ohio, and was incorporated in June, 1929 (R.

38), and acquired the claim herein sued on in a merger as set forth in allegation I of the Petition (R. 1, 11).

The petitioner is a successor to Lowe Brothers Company, a corporation incorporated in 1893. The predecessor corporation filed its income and profits tax return for the year 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; on October 31, 1918, the predecessor filed its income and excess profits tax return for the fiscal year ended September 30, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon (R. 38).

On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company, the predecessor, an additional income and profits tax for the fiscal year 1917 of $31,771.71 (R. 38).

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924 (R. 38).

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917, which claim was formally rejected by the Commissioner on February 25, 1929 (R. 38).

On January 25, 1923, and on February 9, 1923, respectively, petitioner's predecessor filed income and profits tax

waivers for the fiscal year ended September 30, 1917 (R. 38). These waivers expired on April 1, 1924 (R. 38).

This suit is brought against the United States for the reason that Charles M. Dean, who was Collector of Internal Revenue for the First District of Ohio in 1924, was no longer in office as Collector of Internal Revenue at the time this suit was commenced (R. 3).

This suit, which is for the recovery of $11,230.14 (R. 3), was commenced May 24, 1930 (R. 1, 10).

The foregoing statement of facts is taken *verbatim* from the respondent's brief in the Circuit Court of Appeals. To this may be added that the Circuit Court of Appeals in its opinion (R. 48), held that the petitioner was entitled to recover on the merits and that the District Court was in error in that respect but affirmed the judgment on the ground that the District Court had no jurisdiction in the case (R. 49). This question was not considered by the District Court and was not raised here.

SUMMARY OF ARGUMENT.

The Court below held that the credit of the 1918 overpayment to the 1917 tax constituted a collection in the 1917 tax. The petition for the writ of *certiorari* did not seek review of this question but only of the question whether the Court below erred in holding that the District Court had jurisdiction. Respondent did not seek the writ of *certiorari* and consequently, it may be that only the question of the jurisdiction of the District Court is here for review. See *Alexander v. Cosden Pipe Line Co., 290 U. S. 484, 487.* Cases collected *Harvard Law Review, April 1938, p. 1058.* However, out of an abundance of caution we shall argue this question also.

Under the carefully reasoned opinion in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* which the respondent in its response to the writ, concedes is in conflict with the case at bar, the District Court had jurisdiction. When the Circuit Court of Appeals for the Fourth Circuit decided that case, it had the benefit of the decisions relied upon by the respondent in the case at bar. Since the decision of the *Piedmont case,* it has been cited with approval and followed by the Circuit Court of Appeals for the First Circuit in *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d)* ...., not yet published in the Federal Reporter, but appearing in *C. C. H. Tax Service, Para. 9201.* Except for details, little can be added to the reasoning in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296.*

It is true that under the decision of the Court of Claims in *Parks v. Woolson Mach. Co., 58 F. (2d) 868,* the credit did not constitute a collection of the 1917 tax, but the Judge who wrote that opinion stated it was wrong in *First National Bank of Beaver Falls v. United States, 8 F. Supp. 484, 488,* and the Court below agreed with this conclusion in *United States v. John Gallagher Co., 83 F. (2d) 368,* and in its decision in the case at bar. As previously pointed out review of this portion of the decision was not sought by anyone in the case at bar. However, if the Court below was wrong in this then the suit may be sustained as one to recover 1918 taxes.

Respondent, in its memorandum in answer to the petition for the writ, admits that the credit was outlawed. In such circumstances, the statutory law of this country unquestionably provides for its repayment to the taxpayer. The plain mandate of the statute should not be

defeated by subtle and attenuated technicalities, the statute having been passed pusuant to the Constitution is expressly declared by the Constitution to be the supreme law of the land.

Thousands of collections by credit are made annually. Indeed, sometimes the same liability is collected partly in cash and partly by credit. It will work inconvenience and hardship on taxpayers and cause delay to force them, in such cases, to resort to the Court of Claims, which will soon find itself congested with litigation other than tax litigation arising out of the multifarious Government activities undertaken in recent years. Congress would have had no reason for distinguishing a collection in cash from a collection by credit and did not intend to do so and no reason can be suggested why it should have so intended.

Although the rule of sovereign immunity from suit is firmly established here, yet it was adopted from England without considering that the reason upon which it rested had no application to the American Government. For this reason it should not be extended beyond the inescapable dictates of necessity and if a statute can be construed to confer jurisdiction it should be so construed. That it can be so construed is evidenced by *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th)*, and also by *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) (C. C. A. 1st)*, and also by the decisions of the United States District Judges in each of those cases and by the decision of District Judge West in *Reeves Bros. Co. v. United States.*

ARGUMENT.

A Refund To The Taxpayer Of The Money Sued For Was Clearly Commanded By The Statutory Law Of This Country.

It is admitted in respondent's memorandum in response to the petition for the writ that the credit was barred by the statute of limitations. In such case, *Sections 607 and 609 of the Revenue Act of 1928* clearly and unequivocally command refund of the money to the taxpayer. *McEachern v. Rose, 302 U. S. 56.*

The question of whether this refund should be made as a matter of policy was solely for the consideration of the law-making body. The history of the legislation requiring its refund, is set forth in Appendix A of this brief.

That a timely claim for refund was filed by the taxpayer as required by *Section 607* is not questioned.

This refund claim should have been allowed by the Executive Department of the Government. Its denial by that Department was without justification. That Department had no right to deny it because it was not in sympathy with the statutory law. *Section 3 of Article II of the Constitution* enjoins upon the President a duty in these words, "He shall take care that the laws be faithfully executed". This Court has said:

> "And no higher duty rests upon this Court than to enforce by its decree, the will of the legislative de-

partment of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution." *Northern Securities Co. v. United States, 193 U. S. 197, 350.*

Sections 607 and 609 providing for the repayment were passed pursuant to the Constitution.

In perhaps no other country would a clear right given to a taxpayer by the statutory law of a Nation be nullified by attenuated technicalities. Neither common law nor equity can directly or indirectly repeal or annul a statute which the Federal Constitution declares to be the Supreme Law of the Land.

THE COURT OF CLAIMS WOULD HAVE HAD JURISDICTION OF THE CASE.

Respondent does not question that the Court of Claims would have had jurisdiction of the case. However that Court was not in sympathy with the statute and by various attenuated technicalities, one of which was characterized on the floor of the Senate by the Senator in charge of the bill to repeal it as "preposterous", has rendered a recovery under it virtually impossible. The decisions of the Court of Claims creating this situation and supporting this statement are fully explained in Appendix B of this brief.

THE UNITED STATES BY THE STATUTE CONSENTED TO BE SUED IN THE DISTRICT COURT.

The struggle of the taxpayers against the jurisdictional objections of the Government has been a long but progressive one. This Court said in *Nichols v. United States,*

7 Wall. 122, that the Court of Claims had no jurisdiction in suits arising under the revenue laws but subsequently this case was distinguished upon the grounds fully stated in *Dooley v. United States, 182 U. S. 222.*

The words of the statute granting jurisdiction to the District Court are "concurrent with the Court of Claims". These words were recently considered and explained by this Court. *Bates Mfg. Co. v. United States, 302 U. S. ...., 82 L. ed. 698.*

After discussing the history and background of the Tucker Act the Court said:

> "The erection of barriers to recovery in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give claimants an identical *status* in both Courts where the amount in controversy was included in the jurisdiction of both."

The Tucker Act originally gave "concurrent" jurisdiction in tax suits against the United States to the Court of Claims and to the District Court where the amount did not exceed Ten Thousand Dollars. By *42 Stat. 311,* this Act was amended to give jurisdiction even if the claim exceeded Ten Thousand Dollars "if the Collector of Internal Revenue, by whom such tax, penalty or sum, was collected, is dead at the time such suit or proceeding is commenced". On February 24, 1925, by *43 Stat. 917,* the Act was further amended to give jurisdiction if the Collector was "dead or out of office" at the time the suit was

commenced. These amendments were discussed in *Schwab v. United States, 17 F. (2d) 34 (C. C. A. 7th)*, where the Court said at page *35:*

> "It was upon this well-recognized state of the law that the Congress saw fit to amend this so-called Tucker Act, November 23, 1921. What was the purpose of the amendment? Did Congress intend to limit or to enlarge the jurisdiction of the District Court? What had transpired of which the court might take judicial notice, that would throw light upon this question?
>
> "Between the date of the original Act, March 3, 1887, and the amendment, November 23, 1921, the federal Internal Revenue Tax Laws and the World War had both very largely increased the number of claims of the taxpayers and the citizens of the United States. This court takes judicial notice of the fact that the various revenue acts passed during and immediately after the war gave rise to a multitude of claims, which could not all be promptly heard in the Court of Claims.
>
> "The obstacles which confronted the taxpayer who had paid an excessive tax or a penalty and sought to recover the excess were numerous. And they were multiplied when the internal revenue collector who had collected the tax or penalty died before the suit was brought. These facts are significant, it seems to us, on the question of intent. For they supply the background from which it is fairly inferable that Congress merely intended to enlarge the jurisdiction of the District Court so as to permit claimants to bring suits directly in the District Court when they had paid an excessive tax or penalty. It was, therefore, provided, in case the collector was dead, that these claims might be prosecuted in the District Court, regardless of the amount involved."

It is well-settled that the statute is to receive a liberal construction. This Court, speaking through Mr. Justice Holmes in *United States v. Emery, Byrd, Thayer R. Co.,*

237 U. S. 28, at page *32,* has said that the statute conferring jurisdiction in such suits should be construed liberally and that the argument to the contrary:

> "rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye".

The statute was originally enacted and later amended to remedy a defect in the common law. *Blackstone* in his commentaries on the laws of England *(Cooley, 4th Ed., Vol. 1, at *88)* says:

> "There are three points to be considered in the construction of all remedial statutes: the old law, the mischief and the remedy; this is how the common law stood at the making of the Act; what the remedy was for which the Parliament has provided to cure this mischief. And it is the business of the Judges so to construe the act as to suppress the mischief and advance the remedy."

Another reason why the statute should receive a liberal construction is that the rule of sovereign immunity from suit was imported here from England without consideration that the conditions which gave it birth were entirely inapplicable here. It is an outgrowth of the maxim "The king can do no wrong". As said by this Court in *Langford v. United States, 101 U. S. 341,* this maxim has no place in the American constitutional system. When this rule arose in Europe, the king was the State. He was above the law. The people were subjects. In the United States, on the other hand, the people is the sovereign and not the United States. They created the United States and they could dissolve it if they so desired. They delegated to it, as their agent, some of the powers of sovereignty, others they withheld and still others they expressly prohibited the exercise of.

In *State v. Curran, 12 Ark. 321, 344, 345,* it is said that the immunity of the Government from suit,

> "might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience. Because in the absence of any affirmative law to create exemption from liability, and as between a citizen who created a State Government and that Government, on a question relating to any individual right intended to be secured to that citizen by the institution of that Government, there could be no more reason for refusing the right according to the established forms of law, than there could be for refusing the same way against another corporation that was also created by the people, not by themselves in person, but by the exertion of the organ of their sovereignty, unless it could be shown that they had first delegated certain powers, and then surrender to the Government thus created all their other powers, which is directly in the face of the Bill of Rights."

While the rule that the Government cannot be sued without its consent should never have been established in a democracy inasmuch as it is established any Statute by which the Government consents to be sued should receive the most liberal construction possible to give it.*

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* As said in **Christie Street Commission Co. v. United States, 136 Fed. 326 (C. C. A. 8th):** "The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the King can do no wrong. * * * The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view."

JURISDICTION IS CONFERRED IF THE COLLECTOR WHO COLLECTED THE TAX WAS OUT OF OFFICE AT THE TIME THE SUIT WAS BEGUN.

The money sued for was originally paid in cash as an overpayment of 1918 taxes. The Collector who collected those taxes was not in office when the suit was begun nor was the Collector who credited that money in ~~1924~~ 1924 to the outlawed 1917 tax in office when suit was begun (R. 3, 13). We submit that under these circumstances, the District Court plainly had jurisdiction of the case. *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* and *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) .... (C. C. A. 1st), C. C. H. Tax Service, Para. 9201.* In accord with the conclusions of these learned Courts is the conclusion of District Judges who decided those same cases and also the conclusion of Judge West in the Ohio District Court in *The Reeves Brothers Co. v. United States* (subsequently reversed by the Court below).

THE 1924 CREDIT CONSTITUTED A COLLECTION OF THE 1917 TAX.

All the Circuit Courts of Appeal which have considered the question, have held that a credit of an overpayment for one year to an outlawed tax for another year constitutes a collection of the outlawed tax. The Court below so held in the case at bar and in *United States v. John Gallagher Co., 83 F. (2d) 368.* The Circuit Court of Appeals for the Second Circuit so stated in *Gans SS Line v. Bowers, 82 F. (2d) 181, 183.* However, while these cases hold that the credit constitutes a collection of the tax, they hold it constitutes a collection by the Commissioner and not by the Collector. On the other hand, the

Circuit Court of Appeals for the Fourth Circuit in *United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th),* and the Circuit Court of Appeals for the First Circuit in *United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) ...., C. C. H. 1938 Tax Service, Para. 9201,* hold that the credit constitutes a collection by the Collector. We submit that the *Piedmont Mfg. Co. case* is the best reasoned of these cases and commend it to the attention of the Court.

However the Court of Claims held in the case of *Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868,* that the credit did not constitute a collection of the outlawed tax, but the Judge who wrote this opinion later stated that it was wrong in his dissenting opinion in the case of *First National Bank of Beaver Falls v. United States, 8 F. Supp. 484, 488,* and the decision of the Court of Claims in the case of *H. & B. American Mach. Co. v. United States, 11 F. Supp. 48,* cited on page 3 of the Government's response to the petition for the writ in this case, is utterly inconsistent with the *Parks & Woolson case.* The *Parks & Woolson case* rests upon construing the word "void" in *Section 609* to be an entire nullity, whereas the context of that section taken in connection with the requirement of *Section 607* that a claim must be filed before the overpayment can be refunded indicates that the word "void" is used in the sense of voidable. This Court also so held in *Stearns Co. v. United States, 291 U. S. 54* at p. *60.*

As Judge West said in *Reeves Bros. v. Routzahn* published in the *1931 C. C. H. Tax Service, Para. 9022:*

> "To construe the word 'void' as defendant suggests, would convert what Congress intended as a shield for the taxpayer to a sword for the Government".

The Government appealed that case to the Circuit Court of Appeals and while that Court reversed the case it agreed with Judge. West's construction of the word "void". See *59 F. (2d) 915, 917;* see also *Windfall Grain Co., 23 B. T. A. 725.*

In the *Michigan Law Review, Vol. 32, P. 1088 (No. 8), June, 1934,* there is an excellent article entitled "The Varying Meaning and Legal Effect of the Word 'Void' ", and the decisions cited and considered in this article abundantly sustain the conclusion that the Court below's construction of "void", in conflict with the conclusion of the Court of Claims, is correct and sustain the dissenting opinion of Judge Littleton, *8 F. Supp. 484, 488,* wherein he admits that he was wrong in his construction of "void" in his prior decision in the *Parks & Woolson case.*

It may also be mentioned that the Court of Claims allows interest on such credits. (See *7 F. Supp. 600.)* If they were an utter nullity, how could any interest be allowed thereon?

In *Ewell v. Daggs, 108 U. S. 143, 148-149,* this Court said:

> "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act of transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances."

To the same effect see *Weeks v. Bridgeman, 159 U. S. 541, 547; Louisville Trust Co. v. Comingor, 184 U. S. 18, 25; Ramsay v. Crevlin, 254 Fed. 815.*

> "It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are voided by some act; while things are often said to be void which are without validity until confirmed." *Weeks v. Bridgeman, 159 U. S. 541, 547.*

As supporting this same construction see *United States v. Steamship Co., 239 U. S. 88,* from which we also quote:

> "Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice."

THE 1924 CREDIT WAS A COLLECTION BY THE COLLECTOR.

The Commissioner of Internal Revenue is not authorized to collect taxes. As said in *Heinemann Chemical Co. v. United States, 92 F. (2d) 302, 304 (C. C. A. 3rd):*

> "It further appears that collectors of internal revenue are the only persons expressly authorized to collect taxes. *Section 3183 of the Revised Statutes* provides that: 'Collection authority—(a) In general; within district. It shall be the duty of the collectors or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated.'" *26 U. S. C. A., Sec. 1541 (a).*

See also *U. S. C. A., Title 26, Sec. 1531; R. S. 3182,* which provides that all assessments made by the Commissioner shall be collected by the Collector.

The Collector of Internal Revenue, like the Commissioner, is appointed by the President with the advice and consent of the Senate. *(U. S. C. A., Title 26, Sec. 1731; R. S. 3142.)* Except those officers mentioned in the Constitution all others derive their power from statutory law.

Since no other officer of the United States, except the Collector or his deputies, has any authority to collect taxes it would seem, because of the Collector's actual participation in this collection, it must be held to have been made by him if a collection was made by anyone.

What the Collector does and what the Commissioner does in the case of allowance of a credit is fully set forth in *United States v. Swift & Company, 282 U. S. 468,* at pp. *471* to *473.* This case held that the date of the allowance of the credit was the date upon which the Commissioner signed the final schedule. This decision was repealed by Congress in the Revenue Act of 1932, as to schedules signed after May 28, 1928, to make the date of the signing of the first schedule the date of the allowance of the credit. *(U. S. C., Sec. 1670 (3).)*

The decision of this Court in the case at bar concerning jurisdiction will apply to subsequent situations and it is obvious that when the Commissioner signs the first schedule he cannot know, as stated in *United States v. Swift & Company, 282 U. S. 468, 472,* whether the allowance will result in a refund or a credit. The Collector of Internal Revenue must determine that. The schedule which the Commissioner sends to the Collector is contained on page 20 of the Transcript and if the Court will now look at that it will be obvious that it is the Collector who determines, not only to what years additional tax an overpayment allowed is to be credited, but it is the Collector who

is also required to determine and who does determine if there are "taxes due, if any" from the taxpayer. The Commissioner relies upon the Collector's certification. The tax returns are filed in the Collector's office. He knows the date of filing of the return and he knew that the Statute of Limitations had run five years after that date. The fact that five years had elapsed was enough to put him on inquiry concerning whether waivers had been signed by the taxpayer. Nevertheless in the case at bar he undertook to decide the taxpayer owed taxes for 1917 and to credit the overpayment to those taxes. An outlawed tax is not owing because the liability for it is extinguished by the statute under the rule of *Davis v. Mills, 194 U. S. 450, 454.* See also *37 C. J., Sec. 51, p. 732; 17 R. C. L., Sec. 318, p. 952,* which state the general rule of law applicable here. It was so stated in *Mascot Oil Co. v. United States, 282 U. S. 434,* at page *437**.

> "The Commissioner, when he forwarded these papers to the Collector, had no way of knowing whether the overassessment would bring about an abatement of taxes theretofore assessed and unpaid, or would result in an overpayment by the taxpayer. This could only be ascertained by the Collector from the books and records kept by him. *Moreover, after the Collector ascertained whether an overpayment resulted, he would have to determine from his books and records the further question whether such overpayment should be applied as a credit on taxes due or in the absence of any taxes due, ought to be refunded."* (Italics ours.) U.S. vs. Swift & Co., 282 U.S. 468, 472.

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*"At the time the taxes were collected, there was no liability on the part of the taxpayer, but this was also true in the case of the petitioners in **Graham v. Goodcell, supra.**" In **Graham v. Goodcell,** as in the case at bar, the collection was made before the 1926 Act was enacted.

Thus it was the Collector's erroneous determination taxes were due and the crediting of the overpayment against these taxes which deprived the taxpayer of its money. The Collector had more to do with the taxpayer's loss than the Commissioner.

It is submitted that this constitutes as much a collection by the Collector as when some clerk in his office stamps on the back of a taxpayer's check "Pay to the Treasurer of United States or Order" and deposits it in the Federal Reserve Bank. In neither case does the Collector receive any cash. In addition to what is said in *United States v. Piedmont Mfg. Co.*, see also *Peerless Paper Box Mfg. Co. v. Routzahn, 22 F. (2d) 459, 460.*

In *Routzahn v. Landesman Hirshheimer Co. (D. C. N. D., Ohio)*, published in *Prentice Hall Tax Service for 1931 in Para 499, at p. 645* (Appeal dismissed, *51 F. (2d) 1083)*, the Court said:

> *"Sec. 842, Title 28, U. S. C. (R. S. 989)* contemplates, if it does not create, liability of a collector for acts done or moneys collected by him, when the same are illegal and cause loss to the taxpayer, regardless of the fact that he was acting under instructions or attempting to perform his duty. *Arnson v. Murphy, 109 U. S. 283, 3 S. Ct. 184 (4 Am. Fed. Tax Rep. 4611); Detroit Hotel Co. v. Brady, 272 Fed. 995-8 (2 Am. Fed. Tax Rep. 1545).* If he is so liable for an innocent exaction of more than is due as shown by a tax return or certificate of the Commissioner, even after he has paid the money into the Treasury, I see no reason to doubt liability in a case like this. *Defendant took an essential part in an act or series of acts which illegally deprived plaintiff of its money,* and whether the ground of illegality be that the statute had run against collection or some other reason, the defendant's liability under the statute should be the same.

> The application of the credits against an excessive tax amounted to its collection. *Boston Pressed Metal Co. v. United States, 42 F. (2d) 313, 314 (8 Am. Fed. Rep. 11132); Brady v. United States, 24 F. (2d) 205 (6 Am. Fed. Tax Rep. 7291); Swift & Co. v. United States, 68 Ct. of Cls. 97 (7 Am. Fed. Tax Rep. 9085.)"*

The question of the nature of an action against a Collector has been considered by this Court in *George Moore Ice Cream Co. v. Rose, 289 U. S. 373,* at pages *380* to *383* therein. What is there said as to the nature of an action against the Collector is in harmony with our contention under this point and not in harmony with the contention of the Government. It is there pointed out that an action against a Collector "is merely a remedial expedient for bringing the Government into Court".

That a tax is paid by a credit of an overpayment for one year to a deficiency for another year is established by *United States v. Swift & Company, 282 U. S. 468.*

The statute commands that an overpayment shall be credited against a deficiency, but this must be read in connection with the statute making it the duty of the Collector and of the Collector alone, to collect a deficiency assessed by the Commissioner and also in connection with the statute directing the Collector to see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed.

In the case at bar the Collector did not carry out the instructions of the Commissioner appearing on the schedule of overassessments. These instructions were to credit the overpayment against "taxes due, if any". They were not to credit the overpayment against taxes which were

not due and the 1917 tax, against which the Collector credited the overpayment, was not due because it was extinguished by the statute of limitations.

THIS SUIT MAY BE SUSTAINED AS ONE TO RECOVER THE 1918 TAX.

Pollock & Maitland in their *History of the Law of England* state (see pages *558* to *573; 151; 225)* that in the medieval days of the law, if a suitor took out the wrong writ he lost his action although he may have been entitled to recover on the facts either by the common or the statutory law. That condition was no credit to the law and it has been long abandoned. Forms of action have been abolished in all the code States, including Ohio.

As said by this Court in *Bemis Bros. Bag Co. v. United States, 289 U. S. 28, 34:*

> "The rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not".

The Court below did not consider this angle of the case for the reason that it held the credit constituted a collection of the 1917 tax and that the remedy of the taxpayer was by suit to recover the 1917 tax and that although the decision it cited held a taxpayer entitled to recover it held there was no jurisdiction to allow this plain right.

The petition (R. 1-13) can be construed as a suit to recover the 1918 overpayment of $11,230.14. Because it alleges that this money was not paid to it, it was not a suit on an account stated. *Untermyer v. Bowers, 79 F. (2d) 9, 11 (C. C. A. 2nd),* which cites the *Restatement of the Law of Contracts.*

Although it did not allege the filing of a timely 1918 refund claim it did allege facts from which the law presumed the filing of a timely 1918 refund claim. No demurrer or other objection was made to it. It alleged the date of filing the 1918 return was October 31, 1918 (R. 2), and it alleged facts showing that the Commissioner allowed the 1918 overpayment on May 10, 1924 (R. 2). Inasmuch as this was more than five years after the 1918 return was filed the allowance by the Commissioner would have been illegal in the absence of a timely 1918 refund claim. As said in *Stearns Company v. United States, 291 U. S. 54,* at p. *63:*

> "Acts done by a public officer which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter." (Citing many cases.)

The decision of the Court of Claims in the case of *Pratt & Whitney Co. v. United States, 6 F. Supp. 574, 576,* holding that the allowance of the credit constitutes a rejection of the 1918 refund claim is a bar to recovery on this theory if it is correct because the suit was not brought within two years of the allowance of the credit.

It is submitted that this decision of the Court of Claims is not only incorrect and unreasonable but is contrary to the decision of this Court in *Bonwit Teller & Co. v. United States, 283 U. S. 258.*

In *Bonwit Teller & Co. v. United States, 283 U. S. 258,* it appears from the Findings of Fact that the credit was made between the date the first schedule was signed on March 8, 1927, and the date of the delivery of the Certificate of Overassessment to the taxpayer on May 12, 1927 (See *39 F. (2d) 730,* p. *733),* that suit was filed January 7, 1928. There are no forms of pleading in the Court of Claims. *(Bull v. United States, 295 U. S. 263.)* Hence,

if the credit was a disallowance of the refused claim (as the Court of Claims holds), then the *Bonwit Teller & Co.* suit was in time as an internal-revenue suit because it was filed within two years of disallowance. This Court, however, said in *283 U. S.* at page *265:*

> "This case is not within the clause giving two years after disallowance because here the claim was allowed".

In the case of *Gans Steamship Line v. United States,* reported in *1936 C. C. H., par. 9254,* the District Court in New York said with reference to the same situation:

> "As I read the opinion of Mr. Justice Butler in *Bonwit Teller & Co. v. United States, 283 U. S. 258,* this case does not come within the two years after disallowance because the claim here, as there, was allowed. The Court said:
>
> > 'This case is not within the clause giving two years after disallowance, because here the claim was allowed.' "

Furthermore, the Court of Claims itself in the case of *Consolidated Paper Co. v. United States, 59 F. (2d) 281,* said at p. *289:*

> "In reality the allowance of a credit is the allowance of a refund. In either case that which is allowed is an overpayment. When a credit is allowed there is technically and legally the allowance of a refund, but instead of paying the same by check, the amount thereof is applied in satisfaction of a tax due the Government by the particular taxpayer for another year or period."

Furthermore, the allowance of the refund claim for one year and the credit to another year of the amount allowed could not constitute its disallowance. One of these is the converse of the other. Taxes are computed upon an annual

basis. *(Burnet v. Sanford & Brooks, 283 U. S. 259.* A claim for the year 1918 was filed, considered and allowed. The points made by it were conceded not denied. This money was credited to outlawed taxes for 1917 by mutual mistake of law. (See *Staten Island Hygeia Ice & Cold Storage Co. v. United States, 85 F. (2d) 68,* at p. *71 (C. C. A. 2).*

As stated in *Graham & Foster v. Goodcell, 282 U. S. 409, 417,* it was not until the decision in *Bowers v. New York & A. Lighterage Co., 273 U. S. 346,* decided February 21, 1927, that the Treasury Department knew there was any limitation on its right to collect a tax by distraint. It was not until January 2, 1929, when *Russell v. United States, 278 U. S. 1,* was decided (reversing the Circuit Court of Appeals), that it was determined this rule had not been changed retroactively by the Revenue Act of 1924. It was not until the decision in *United States v. Swift & Company, 68 Ct. Cl. 97,* decided May 6, 1929, affirmed by this Court February 1, 1931, *282 U. S. 468,* almost ~~more than~~ a year after this suit was begun, that it was determined this particular credit involved here was made too late. That decision settled the date upon which a credit was made. Consequently the Commissioner did not know, as stated in his letter (R. 21) that the credit was outlawed.

The taxpayers likewise did not know that the tax was outlawed and that there was no right to make the credit. Indeed, the Court of Claims held in *Toxaway Mills v. United States, 61 Ct. Cl. 363,* that a taxpayer had no right to recover an outlawed tax because of the provisions of *Section 1106 (a) of the Revenue Act of 1926.* It was not until the 1928 Act was passed that the taxpayers' right to recover the credit was clearly established.

The entire trend of modern authority is to put mistakes of law on the same basis as mistakes of fact. *Williston, Contracts (2d Ed.), Sec. 1581; Pomeroy, Equity Jurisprudence (4th Ed.), Sec. 849.* See also, *Cooper v. Phibbs, L. R. 2 H. L. 149, 170; Lansdowne v. Lansdowne, 2 Jac. & W. 205; Reggio v. Warren, 207 Mass. 525, 536, 93 N. E. 805, 32 L. R. A. (N. S.) 340, 20 Ann. Cas. 1244; Order of United Commercial Travelers v. McAdam, 125 F. 358, 368 (C. C. A. 8).*

The conclusion of the Court of Claims that the allowance and credit of a 1918 overpayment to a 1917 tax (made under such mutual mistake) constitutes a rejection of the 1918 refund claim is in conflict with obvious reason. Suppose Your Honor put in a claim against a man of $100.00 for 1918 and he said, "Your claim is just and I hereby allow it, but I will credit it against a debt due from you for 1917". Manifestly, this would not constitute a rejection of your 1918 claim, and under a Court pleading setting up these facts, the sole issue would be whether he had the right to credit it on your alleged 1917 debt. So it is in the case at bar.

The Commissioner of Internal Revenue never claimed that the credit of the 1918 overpayment to the 1917 tax constituted a rejection of the 1918 refund claim. Indeed, he did not reject and refuse to pay the 1918 refund claim until he issued his letter June 29, 1929 (R. 21) and this suit was filed within two years thereafter.

After the discovery of the mistake which led to the credit and after intensive consideration and hearings, Congress in 1928 enacted *Sections 607 and 609 of the Revenue Act of 1928,* providing for the return of such money to taxpayers. If the Court of Claims is right in holding

the allowance of a credit constitutes the rejection of a refund claim, then these provisions of the law have no effect whatever because except in a few isolated cases taxpayers, due to the mutual mistake, did not bring any suit within two years of the date of the credit. These sections were mainly concerned with assessments made prior to June 2, 1924, because as to assessments made after that date the Revenue Act of 1924 allowed six years after the date of assessment within which to collect them and such assessments were not barred when the 1928 Act was enacted so that the only assessments which could be affected by the express retroactive provisions of *Sections 607 and 608* were those made prior to June 2, 1924. As to such assessments, if the decision of the Court of Claims is sound, it erases this legislation (passed for the benefit of taxpayers) from the books. (See Appendix B hereof.)

CONSEQUENCES OF HOLDING TAXPAYER'S SOLE REMEDY IN CASE OF A CREDIT COLLECTION IS IN THE COURT OF CLAIMS.

If it should be held that in case of a credit collection taxpayer's sole remedy is in the Court of Claims, then Congress will be compelled to amend the law. Otherwise thousands of cases will be forced into the Court of Claims. Taxpayers from Alaska to Florida will be obliged to go there. That Court can hardly escape being soon flooded with litigation growing out of the contracts the Government has made as a result of its activities to combat the depression. This will bring about the delay in the hearing of cases along with the inconvenience of compelling taxpayers located at a distance to sue in Washington. The report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1937, shows, on page 6 thereof,

that 15,257,987 tax returns were filed in offices of Collectors of Internal Revenue during that fiscal year.

Whatever ruling is made in this case will apply not only to income taxes but to Social Security taxes and other various excise taxes. If the Government claims a taxpayer owes Fifty Thousand Dollars for one year and has made an overpayment of Five Thousand Dollars for another year, it will collect Forty-five Thousand Dollars from him in cash and credit the other Five Thousand Dollars, but if he wants to sue for the entire amount he will have to go to the Court of Claims if it is here held the District Court has no jurisdiction in case of a credit.

CONCLUSION.

The case of *United States v. Swift & Company, 282 U. S. 468,* establishes that a collection is made by crediting an overpayment for one year to a deficiency for another year. No distinction should be made in the case of a credit declared by *Section 609* to be "void" because that word has been construed to mean voidable at the taxpayer's option. *Stearns Company v. United States, 291 U. S. 54,* at p. *60.* See also the decision of the Court below in the case at bar.

However, if the credit did not constitute a collection in 1917 tax, then the suit may be sustained as a suit to recover the 1918 overpayment because it was brought within two years from the first rejection by the Commissioner of the taxpayer's 1918 refund claim (R. 21).

If the credit was a collection of the 1917 tax then jurisdiction should be sustained because the rule of sovereign immunity from suit was referred to in *George Moore Ice*

Cram Co. v. Rose, 289 U. S. 373, 382, as "a relic of obsolete modes of thought" and the Statute whereby the United States has consented to be sued must receive a very liberal construction. This point was overlooked by the Court below which gave it a strict construction.

That a literal construction will sustain the jurisdiction is evidenced by the fact that ten able and experienced federal Judges have so held. (Two Circuit Courts of Appeal by unanimous decisions—*United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th). United States v. Bertelsen & Peterson Engineering Co., 95 F. (2d) ...., (C. C. A. 1st);* the two District Court Judges in those cases. Also District Judge West in *Reeves Brothers Co. v. United States* and District Judge Hulbert in *Gans S. S. Line v. United States,* published in *1936 C. C. H. Tax Service, par. 9254.)*

In this connection it may be mentioned that the case of *Iron Cap Copper Co. v. United States, 282 U. S. 476,* was a suit in the District Court to recover $11,592.18 interest (see *39 F. (2d) 560,* at page *562)* and all Courts including this Court assumed jurisdiction existed.

For the foregoing reasons the decision below should be reversed.

All of which is respectfully submitted.

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APPENDIX A.

HISTORY OF SECTIONS 607 AND 609 REVENUE ACT OF 1928.

The Treasury Department thought there was no limitation on its right to collect a tax by distraint and published a public ruling so holding. (See *Graham & Foster v. Goodcell, 282 U. S. 409,* at page *417.)* This Court held otherwise in *Bowers v. New York & Albany Lighterage Co., 273 U. S. 346* (decided February 21, 1927). It thus appeared that hundreds of collections had been made too late. The Treasury asked Congress to prevent their refund and the taxpayers presented to Congress the contrary view.

Congress compromised the matter by ordering the refund of the money in all cases except where a claim in abatement had been filed. At first the Senate refused to agree to this exception but finally agreed to it in conference. This exception does not obtain in the case at bar. Its history is set forth in *Graham & Foster v. Goodcell, 282 U. S. 409,* which upheld the exception. This legislation providing for the refund of the money was the result of extensive consideration and hearings by both the House and Senate Committees.

The reports by the Congressional Committees upon the Revenue Bill of 1928 uncontrovertibly show that it was intended that credits of overpayments against barred deficiencies should be refunded. The report of the Ways and

Means Committee (70th Congress, 1st Session, Report No. 2, page 33) stated that *Section 1106-A of the 1926 Act* had failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment and collection of a tax, and that *Section 1106-A* was repealed as of its effective date and replaced by *Sections 607 to 610* of the new Bill. The report further stated that *Section 607* provided that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment. The report further stated that *Section 609* provided that the credit of an overpayment against the barred deficiency shall be void if a payment of the deficiency would constitute an overpayment under *Section 607* and the report further stated that an overpayment under *Section 607* is to be credited or refunded the same as any other overpayment. The statements in the report of the Finance Committee *(70th Congress, 1st Session, Senate Report No. 960)* were to the same effect and in substantially the same language. The Senate Finance Committee added the statement that any overpayment shall be credited or refunded only if claim therefor is filed within the proper period of limitation.

APPENDIX B.

How The Decisions Of The Court Of Claims Have Nullified The Rights Given Taxpayers By Sections 607 and 609 Of The Statute.

The Court of Claims has not been in sympathy with actions by taxpayers to recover outlawed collections and has virtually nullified the command of Congress that such collections or credits be refunded to taxpayers.

In *Toxaway Mills v. United States (61 Ct. Cl. 363)*, it held the Statute of Limitations merely barred the remedy and if the Government got the money it could keep it. If this view was sound it made it useless for Congress to put a Statute of Limitations in a Revenue Act because the taxpayer could not enjoin collection under *Graham v. Dupont (262 U. S. 234)*. Solicitor General Mitchell, a great and candid lawyer, admitted this decision was utterly unsound and this Court granted *certiorari. (270 U. S. 637.)* When this decision of the Court of Claims was brought to the attention of Congress it considered it "preposterous" and decided to repeal it by legislation. Accordingly, it enacted *Section 1106 (a) of the Revenue Act of 1926* declaring that the statute should not merely bar the remedy but should extinguish the liability.

In support of this amendment, Senator Reed made the following statement *(Congressional Record, Volume 67, Part IV, page 3531)*:

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very

peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the Collector may nevertheless issue his distraint, and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that the case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The Report of the House Conferees, who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims *(Toxaway Mills v. United States)* although in a case presenting the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft, C. J.; In *Graham v. Dupont, 262 U. S. 234, 256, 258." (House Report No. 356, 69th Congress, First Session, p. 55.)*

After *Section 1106 (a)* was enacted, Solicitor General Mitchell confessed error and this Court reversed the *Toxaway Mills case, 273 U. S. 781.* However, in giving judgment on the mandate, the Court of Claims intimated that if *Section 1106 (a)* had been properly construed it would have barred recovery. See *63 Ct. Cl. 646.* This alarmed taxpayers and to clarify and put beyond doubt the intention of Congress to entitle taxpayers to recover outlawed

credits and payments, it enacted *Sections 607 and 609.* This appeared from the Committee Reports referred to in Appendix A. Because this Court in the case of *Graham & Foster v. Goodcell,* 282 *U. S. 409,* had said that an erroneous credit constituted collection of the tax, the taxpayers sued on that theory, but the Court of Claims in *Parks & Woolson Mach. Co. v. United States, 58 F. (2d) 868, cer. den. 287 U. S. 634,* held that such a credit did not constitute a collection.

In opposing the petition for the writ of *certiorari* in that case the Government at the bottom of page 5 of its memorandum, made the following statement:

> "Taxpayers are adequately protected in situations like the present, since the certificate of overassessment amounts to an account stated against the United States. *(Bonwit, Teller & Co. v. United States, supra.)* Recovery may be had upon the issuance of such a certificate even though the amount set forth therein has been erroneously credited on a tax liability barred by the statute of limitations. The credit in such a case would be void and should not affect recovery."

The taxpayers then sued in the Court of Claims on accounts stated, taking the Government at its word, but the Court of Claims repeatedly and consistently held that there was no account stated in such case. *Leisenring v. United States, 3 F. Supp. 853,* and numerous cases which follow it and which appear by reference to the citator. Although, where there was no question of an outlawed tax, the Court of Claims has gone to great lengths in establishing accounts stated, it has consistently failed to hold that there was an account stated in a suit to recover an outlawed tax. Finally it reached the conclusion that not only was there no account stated in such case but that there was an account settled. *First National Bank of*

Beaver Falls, 8 F. Supp. 484, 487, and hence taxpayers were concluded.

When the taxpayers countered with the only claim left, that they were suing for the original overpayment instead of for the credit, the Court held that the making of a credit constituted a rejection of the refund claim and as none of these suits had been brought within two years of the date of rejection, which incidentally in the majority of cases was more than two years before the Revenue Act of 1927 was enacted, they were all barred.

Thus was a clear right given the taxpayers of a Nation by a law of Congress enacted pursuant to the Constitution and which the Constitution itself declared constituted the supreme law of the land, whittled away and destroyed by what was apparently the superior law of the attenuated technicalities—which, it is respectfully submitted, were all unsound.